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Reorganization of the Ombudsman model in Kosovo

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Abstract

The advancement of the Ombudsman's work directly affects the strengthening of the rule of law. Every administration undergoing transition as is the case in Kosovo must increase its efficiency in meeting the rule of law standards. The edifice of mechanisms controlling the powers does not suffice if they are not attended by functional and efficient practices, which from time to time and when needed, are examined and analyzed, both in structure and in terms of the results they give. Therefore, this is the motivation and main purpose of the analysis at hand, which takes into consideration the normative content, comparing it with other countries in the region and beyond. The current model belongs to the "emergency" phase before the era of independence when its role was left in the second plan, while it has much more importance in controlling the work of public administration bodies. In addition, the Ombudsman is still not sufficiently respected in public administration, and has a limited scope in society mainly due to lack of competence. From the examination it will appear that the role of the Ombudsman will increase by shifting from the current monocratic model to the collegial model in order to expand the scope of activity and increase

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the competencies. This will influence his recommendations to be taken into account more by those segments of the administration that make concessions or violations of legality. Recommendations should be legally binding.

Keywords: *Ombudsman, organizational models, competencies, public administration, human rights.*

Meeting the standards for the rule of law from Kosovo's state institutions on the road to successful state building necessarily requires the strengthening of the role of independent power control mechanisms. In this regard, the Ombudsman plays an important role, provided that he is more respected by other public administration bodies to which he is addressed in case of violations.

The purpose of this work is based on this need and benefits the functioning and increase of the efficiency of the Ombudsman as an independent body of control over public administration and human rights protection in Kosovo. The paper focuses on trying to answer the issue of extending the scope of this mechanism. The implementation of new models imposes additional competencies for specific areas, which so far have not been discussed. Remodeling necessarily requires a new normative approach and consequently constitutional and legal changes.

The administration is aware of its duties and obligations under the constitution and the law, but it often happens that these obligations are not respected in practice. Therefore, the idea of the existence of a mechanism such as the Ombudsman, whose responsibility has always been to prevent and independently correct the administration. The paper's focus is on model analysis that could be recommended to be implemented in Kosovo by comparing

successful experiences from other countries as well as scientific research by various authors.

The paper relies on qualitative methods the legal contents in a comparative context are compared with those at the regional and partly European level. The models that are being considered have been successfully implemented by different European countries, departing from Nordic countries of the origin of this mechanism. Finally, the synthesized results of what have been reviewed are given, and recommendations for the new organizational model and additional competencies for the institution of the Ombudsman in Kosovo.

The paper analyzes opportunities to increase the role of the Ombudsman in Kosovo through the re-organization of the current model and competences. For this purpose, a brief overview of the origin of this mechanism is provided, and the various models referred to by scientists and state legislation.

Origin, dissemination and definition of the Ombudsman Institutions

The first signs of the existence of institutions similar to the Ombudsman lie deep in history and early civilizations. In the electronic Sensagen Dictionary, the article titled *Origins and etymology* of Ombudsman, it is said that in Ancient China, in the Huan Dynasty an institution called Juan (221, B.C) was created tasked with controlling the abuses of officials with power. As stated in the Electronic Encyclopaedia Antique History, in the article *Tribuni Plebis* in ancient Rome, tribunes played the role of lawyers of the people. They were responsible, among other competencies, for citizen complaints against power abusers. In the Arab

Caliphate, according to the Conference Report *The Network of Ombudsman in the Member States of the Islamic Cooperation Organization* (2014), this mechanism was called *Judge of the Judges* (in the original: *Qadi-al-Qaddat*), who was a powerful official with full financial and administrative autonomy able to investigate any and every action involving a state official in maladministration. According to this report, in the Ottoman Empire, the Sultan appointed a person named *Mohtasib* in order to control the conduct of imperial officials in the execution of his orders, protecting the remonstrants from violations.

At the beginning of the 20th century, the mechanism of the Ombudsman was installed in the Scandinavian countries. It did not take long for it to spread with great intensity in other countries in Europe.

According to Herzog (2015) "It was King Karl XII of Sweden ... who in 1713 named a representative called the *Högste ombudsmännen* to control government administration (p.185).

The Swedish Ombudsman, who is the first of its kind in Europe, according to Herzog (2015), "apparently originates from the inspiration of Swedish King Charles XII, from his time in Istanbul ... and after returning in Sweden, decided to have a similar office there" (p.185).

It took a relatively long time until this institution began to spread to other places, followed by Finland in 1919. According to Kucsko-Stadlmayer (2008), "it was Denmark that in 1954 initiated the popularity of this mechanism and created a new legal framework that became a very important model for future developments. But also Norway adopted such a legal structure in 1963" (p.1). Reif (2004) also points out that "public sector ombudsman popularity grew in the 1960s, as it was said, it was the version of the Danish and

Norwegian office embraced by other countries" (p.6). With regard to the European extension of the Ombudsman, the author Henk Addink (2005) distinguishes three stages of its extension: "The first phase belongs to Sweden (1809) and Finland (1919), the second relates to Denmark (1954) and Norway 1962), while the third phase begins in the seventies and ends in the nineties of the last century" (p.271).

The definition of the scope of work and the social causes that led to the formation of this mechanism have been formulated by some authors, among whom are Buck, Kirkham and Thompson (2011). These authors argue that "Large-scale bureaucracies created new opportunities for both arbitrary and incompetent exercise of power and, as a consequence, a growth in citizen complaints against the various emanations of the state" (p.10). Hedee (2000) adds in this respect that "in much of the remainder of Europe, the reason for the adoption of the ombudsman institution has been more prosaic and has been linked to the growth of the administrative sector" (p.10).

A more basic definition is given by author Frahm (2013), who states that "although there is no universal definition since the birth of the Ombudsman Institution, however, there is a broad agreement that the Ombudsman is an institution that receives, investigates and reports complaints about the (or lack of) actions of the public administration" (p.4). For the same problem, the albanian author, Stavileci (2010), states that "the Ombudsman is an institution of Swedish descent who understands the mediator or citizen's representative in relation to the administration in the protection of their rights; an institution of control over the work of the administration, with full independence, without any excessive formalism ..." (p.46). From another point of view, Roy and Philips (2000), despite

the differences in typology share a common vision of the features of the institution should include:

“Investigating violations committed against any person or group of persons arising from decisions, recommendations or any other administrative act issued by an organ or public administration official; investigating complaints against the government or government officials, departments, and various public agencies; relevant recommendations, at the end of investigations on the administrative bodies that are within its jurisdiction; reporting of the legislative body to the results of its activity, as well as to any specific issue that could result in a wider interest” (p.3).

Regarding the issue of defining the ombudsman, the author Sokoli (2010) emphasizes “this mechanism, which in his genesis was determined to maintain the balance between the executive (see: the king) and the legislative” (p.147). In line with this, Vogiatzis (2018) contends that “... the Ombudsman institutions in general have the potential to contribute to policy democratization, including more accessible policies, introducing opening and transparency, being a mediator between individuals and the administration and an instrument of democratic participation “ (p.58). Thus, it is a common thought among many authors that as a result of the rapid development of social relations, the state also grows. Resultantly, the legal relations and the bureaucracy may also increase the abuse of power. Hence, there was a need for additional mechanisms for dealing with complaints, such as the Ombudsman. Determining the scope of activity in some countries as a controller of the legality of administrative and human rights decisions and in others with jurisdiction over violations in the justice system or competencies in special areas, the scope

of these control mechanisms was mainly defined according to the political cultures of the specific countries but also depending on the stage of democratic development in which specific countries were located at the time when they formed these mechanisms.

Ombudsman in the countries of the region and in Kosovo

The Ombudsman in Albania is a constitutional body that operates based on the Law on Ombudsman no. 8454 of 4.2.1999 and the internal regulations of his office. The Ombudsman has full jurisdiction at the national level. It was formed with the 1998 Constitution, since in 1995, Albania joined the Council of Europe, which warranted the existence of a mechanism for human rights protection. This was reflected in the 1998 Constitution (Articles 60-63). Under the constitutional authorizations, "the Ombudsman protects the rights and legitimate interests of the individual from unlawful and irregular acts or inactions of the public administration bodies" (Article 60). In addition to these acts, its activity is based on the Code of Good Administrative Behavior, the Law on Consumer Protection, the Law on the Right to Information, the Law on Rights and Treatment of Prisoners and the Internal Rules of Work of his office.

The Slovenian Ombudsman was preceded by the Council for the Protection of Human Rights and Fundamental Freedoms. The members of this Council were university professors, artists, journalists, priests and other specialists in the field of human rights. The Human Rights Ombudsman, based on Article 159 of the Constitution, took over the duties of this Council on the first of January 1995 (Human Rights Ombudsman official web page, Slovenia).

According to the Slovenian Constitution of 1991 (Article 159), “with the aim of protecting Human Rights and Fundamental Freedoms in relation to the state authorities and local self-government, the holders of public authorizations, the office of the Ombudsman for Citizens' Rights will be established by law”. Thus, the Law on the Slovenian Ombudsman No. 71/1993 was created, which sets out detailed provisions regarding the legal status, duties and competencies of the Ombudsman. According to the Law on Ombudsman No. 71/1993, the working criteria of the Slovenian Ombudsman are constitutional provisions and international legal acts on human rights. In addition to human rights, the Slovenian Ombudsman is in charge of and has legal jurisdiction over regimes in cases of mismanagement (Article 3).

The roots of the Ombudsman Institution in Kosovo are not very profound. They relate to the time of the end of the war (1998) and the subsequent deployment of United Nations administration (hereafter: UN). For the first time in Kosovo, this administration founded the Ombudsman in 2000 based on the Regulation no. 2000/38, after almost two centuries from the establishment of the first Swedish Ombudsman (1809). Peculiar in the case of Kosovo is that of its founder, i.e. the UN. According to Regulation 2000/36, this institution was designated as the Ombudsman Institution of Kosovo and was authoritatively appointed by the UN's Head of Mission. Later, in 2006, according to Regulation No. 2006/6, the Ombudsman was elected by the Assembly, democratizing his election and accountability, but still leaving behind the importance and power of the competences he should have. After the independence of the country (2008), circumstances changed for the benefit of the Ombudsman. Thereafter, its authorizations are based on the

Constitution and the Law on Ombudsman No. 05/L-019, 2015. Although these documents include a wide range of fields, some of them are not included. According to these documents, the final acting mechanism of the Ombudsman is the Recommendation which should be applied by the bodies to which it is addressed. However, because of its insufficient legal power, it can not force the parties to fully implement what is recommended. Consequently, the analysis carried out in this paper is focused on the remodeling and enhancement of competences, in the benefit of the efficiency of its controlling role, both for human rights and the legality of the public administration decisions.

Regarding the competences, the Kosovo Ombudsman has the following powers: children's rights protection; protection of citizens from discrimination and promoting equality; the implementation of the role of the National Mechanism for Torture Prevention; the promotion of the protection of human rights; the performance of Amicus Curiae, and mediation and reconciliation. These competences are defined by the Constitution (Article 22). Against this scope, we note that its competences are deficient because they do not cover some important areas, both from the public and private sectors.

Different models for the Ombudsman Institution

Regardless of the typologies and competences it embodies, the role of an Ombudsman has generally been thought of as a mechanism for control purposes. Various countries around the world, in the region and in Kosovo, have created different models of the Ombudsman. These models have been based on the need to strengthen the rule of law through independent control over their administrative organs,

somewhat against judicial ones, by implementing this practice both in the public and often private sector (the latter lacking in Kosovo); in general; somewhere elected by the legislative and elsewhere by the executive, at the national or regional level; in the case of the European Union as a supranational level. Different authors have mentioned different models, implemented for different and even specific areas. This facilitates understanding the scope and role of these institutions. In reality, the purpose of this paper is to find an adequate and more efficient model to reflect on the organization of the Ombudsman in Kosovo.

Hence, there are different models that apply across developed countries, which could serve as good and convenient practices to implement in the circumstances of Kosovo. Some of them referenced by the author Reif (2004), of interest to our review, are as follows:

- 1) Executive Ombudsman created by government departments, agencies and public corporations to handle internal or external complaints: Established by a government department, agency or public corporation at the national or regional level of government;
- 2) The public and private sector hybrid ombudsman created by legislation on an industry or service sector to resolve customer complaints;
- 3) Private sector self-created ombudsman (industry, services) for solving client-customer complaints;
- 4) Organizational Ombudsman created by private sector institutions and corporations (p.26-28).

Based on these models and in line with our point of view, it is of particular interest to cover the private sector as in some of its branches major violations have been observed thus far especially regarding issues of informality that as a consequence, result in a situation where complaints about

violations from employees can not appear in the courts although they may have far-reaching consequences for the lives of employees in this sector. In this regard, an Ombudsman covering the private sector would be considered a right and necessary solution.

By classifying them according to their competencies Kucsko-Stadlmayer (2008) distinguishes three other models of the Ombudsman: "the classic model, the hybrid model of human rights and the rule of law model" (p.61-62). The last missing model, the one on the rule of law, is of great interest to be implemented in the transitional circumstances that Kosovo is going through. Strengthening the rule of law is of vital interest both for the state building itself and for the country's aspirations in the Euro-integration processes. Thus, its weight surpasses the role of the human rights protection and the rule of law, more so when we consider a well-respected statement by Stroink (2005), who characterizes the Ombudsman's institution as "a mechanism which can play a balancing role between the three powers" (p.271).

In comparison, unlike Kosovo, we can take the fact that from the regional countries discussed in this paper, the rule of law model is applied in Slovenia. Consequently, a proper analysis of the remodeling of the Ombudsman in Kosovo takes special attention.

Reorganization of the Ombudsman model in Kosovo

Referring to models in general, we can say that their review has helped us draw similarities and adaptability to Kosovo's needs and circumstances. The most typical and common feature in all the countries that were compared is the authority of the Ombudsman to provide recommendations regarding violations. In the Kosovo case there are legal

weaknesses in terms of its competences. From a legal point of view, they should be strengthened to ensure that beyond the authoritarian obedience or public pressure and charisma, the administration should be obliged to implement the recommendations of an Ombudsman. The lack of a legally binding character for his recommendations prevents the necessary and immediate implementation of these recommendations from the public administration bodies. obedience and public denunciation does not suffice. In this sense, we have many civil society organizations that can play this non-binding awareness-raising role, of which many exist in Kosovo. In this case, a legal norm is needed that binds the administration to legal sanctions in cases of offense.

The Ombudsman's recommendations are acts that charge administration with certain tasks. In various doctrines, recommendations are considered as "soft law" acts. Actually, the Ombudsman's recommendations exert their influence not through the typical attribute of power, which is t *obligative* to others, but through its *authority*, its *arguments* and *public pressure*. The recommendation instrument expresses the special character of the Ombudsman's function d without the norm of obligation, but through his *power of persuasion*. As such, what is the real legal force of these recommendations? The Ombudsman's decisions are similar to administrative acts, but are not authentic administrative acts. The main quality that differentiates between these is the sanction. The administrative act is an expression of the legal will, which also contains sanctions in case of non-enforcement, while the Ombudsman's recommendation does not have this element. On the other hand, his recommendations are an expression of administrative activity and legal will, but without binding force. These recommendations have a legal and

administrative contravention in themselves because they are sent for enforcement to another body, which itself is responsible for the violations that are evidenced in the given recommendation. So in this case, a voluntary self-implementation of the administrative decision is required. However, no official body responsible for violations will sanction itself without being obliged to do so by another norm.

For these reasons, in the future, the idea is to give the Ombudsman recommendations the power of sanctioned administrative acts. The investigative procedure when initiating a case consists of three stages: initiation, proceeding and investigation. This lacks the last phase that exists in the proper procedure of an administrative act, i.e. sanctioning. Therefore, if the Ombudsman's decisions would have the power of a legally binding recommendation, results in controlling the administration and citizen protection would be significantly greater. This is also based on the fact that the Ombudsman is a body of constitutional power and therefore its authority should be imposed on the bodies over which it has jurisdiction control and which do not comply with the law.

The model applied in Kosovo of an Ombudsman for all areas and cases, the hybrid or human rights model as it is otherwise called, is inadequate for a state that is undergoing democratic transition, as these societies are expected to have more violations and maladministration, and consequently a greater workload. In the Constitution of Kosovo (2008), it is stated: "The Ombudsman oversees and protects the rights and freedoms of individuals from the illegal and improper actions or inactions of public authorities" (Article 132, point 1). So, as seen, this mechanism only covers the public domain, but not the private sphere.

The need for expanding the scope of activity also takes into account the number of violations referred by the Ombudsman. According to his report, the low level of compliance with the recommendations is only 31%, while 78% of the violations that have been made by public authorities are stated in the Annual Report for 2017 (p.321).

Based on these considerations, we recommend that the existing Ombudsman should be reorganized. The reorganization should include establishing a collegial body that will consist of Ombudsmen for specialized areas that operate with competences in more than one field, currently extending the scope of the institution beyond the protection of human rights even in control of the legality of public administration acts as well as in the judiciary. The composing lawyers within this collegial body will do their work in interaction but independent of each other by being co-ordinated by a leading lawyer of the institution. This body can be referred to as the Council, the Institute, the Board, etc., as stated by Kucsko-Stadlmayer (2008) in Norway, called the "Federal Ombudsman College" (p.450).

By aiming for a more effective public administration in Kosovo that meets human rights standards and respects legality, it is obviously very important to implement a new form of organization for the Ombudsman. This should be done so that its activity covers all areas of social life in the function of independent control of the public and non-public administration.

This way, some special models could be applied to the Ombudsman, such as the private sector that would cover and deal with the field of labor rights, social and pension affairs, the rights of employees in the private sector toward employers, the rights of unemployed and social cases; then for the missing persons; for children; for education; health

and the military. Other similar models could also be incorporated into this collegial body as the need and rationality that the legislative branch of power would foresee as necessary.

An Ombudsman cannot have more success in all areas than a specific one for a particular field. In addition to the low level of compliance with its recommendations (31%), and the high rate of violations committed by public authorities (78%), arguments for this are the fact that court proceedings have proven to be not a fully effective mechanism, due to delays in procedures and higher financial costs incurred in court hearings. A major obstacle is the lack of implementation of the European Court of Human Rights practice, as argued by Martinez and Cuchi (2017). Finally, the other argument is the private sector involvement in the possibility of complaints against commercial and non-commercial entities in cases of violation of administrative rights and procedures. In this regard, O'Brien and Seneviratne (2017) argue that "the Ombudsman's treatment was traditionally reserved for public authorities, although the 1980s witnessed the appearance of the Ombudsman to investigate complaints against various private sector bodies" (p.10).

Based on the data on the low impact of the recommendations, we suggest to extend the Ombudsman's powers so that he can force the administration to correct the abusive decisions, all this in benefit of strengthening the rule of law. This fact is reinforced by McMillan (2004) too, who argues that "from the perspective of the rule of law, the handling of complaints by the Ombudsman strengthens the notion that the government is bound by rules and that there may be one independent assessment of compliance with the rules. The accountability of the government and the right to

complain go hand in hand ... Knowing the right can be an important sign if democracy and rule of law are being practiced" (p.7).

As a preliminary conclusion, the role of the Ombudsman can not be successful if it is based solely on charisma, persuasive power (arguments) and the public pressure he exerts on public administration bodies. But this is also argued by the examples implemented by more developed democracies than Kosovo. There is scope for implementing some models that provide more rule of law and are more efficient in organizational terms, that is, they have the widest scope, and consequently the competence that guarantee the imposition of the Ombudsman's role.

As a preliminary conclusion, we may note that the Ombudsman's role can not be successful if it is based solely on charisma, persuasive power (arguments) and the public pressure it exercises in the public administration bodies. But this requires additional competencies through an new and more effective organizational structure. In this effort we want to follow the examples that are applied in the most democratic countries. Our scope, in the case of Kosovo, is to implement the model for the Ombudsman, which provides more rule of law in order to impose its role in society.

Conclusion

The views on reorganizing the activity of the Ombudsman in Kosovo are motivated by the aim to increase the efficiency of public institutions in the rule of law, the overall social goal. Especially as the current form of organization is extensive and even bureaucratic relying on an "emergency" model of UN administration in Kosovo (UNMIK), which has almost been a mere decoration in the political institution's mosaic,

where its importance was rather insignificant, it is vital to reconsider its role in Kosovo.

Given the barriers from the past, and the arguments we analyzed for the functionalization of the work, we think that the conditions are met, and this is also required by the political processes of state building as well as the Euro-Atlantic integration ones, henceforth implementing a more advanced model for the Ombudsman in Kosovo. Two elements that we recommend would have made it more effective in solving the cases that the jurisdiction is liable to. These are a) the reorganization of the institutional model with the aim of *expanding the scope of activity*, and b) the strengthening of competencies by making his recommendations legally binding.

With regard to these two issues, without prejudice to the role of “the fourth power” and without interfering in the balance of powers, the Ombudsman could be transformed, by means of a mechanism that stamps the time of emergency institutions, to a modern and efficient enforcement mechanism in accordance with the most advanced European and global standards.

This is reflected in the overall review through a series of examples from both European and regional countries, which support the conclusion that the role of the Ombudsman in external control is of great importance for the democratization of society, and this role needs to be consolidated.

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